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No. 1169

In the

Supreme Court of the United States

OCTOBER TERM, 1965

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners-Appellants Below,

vs.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO, Rockford, Illinois, Winnebago County, et al.,

Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No.

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners-Appellants Below,

vs.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO, Rockford, Illinois, Winnebago County, et al.,

Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Suburban Tile Center, Inc., and United Construction and Trades Union, Local #102, respectfully pray for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on November 30th, 1965.

OPINION BELOW

The United States District Court for the Northern District of Illinois, Eastern Division, sustained the motions of the respective Respondents-Defendants, hereinafter referred to a "Respondents", to dismiss the Petitioners' Complaint, as amended, and dismissed said cause with prejudice. Said Complaint appears at pages 6 through 39 of the Joint Appendix, (JA 6-39), and the amendment to said Complaint appears at (JA 68-71). The Respondents' respective motions to dismiss appear at (JA 75-79).

(A copy of the order of the District Court, dismissing said cause with prejudice, appears at (JA 81).)

The United States Court of Appeals for the Seventh Circuit, affirmed the judgment of the District Court, (App. P. 1a). The decision of the United States Court of Appeals for the Seventh Circuit is reported at 354 F.2d 1, 7 Cir., (1965).

JURISDICTION

The judgment of the Court of Appeals was entered on November 30th, 1965. Rehearing was denied on January 4th, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1); and 28 U.S.C. 2106.

QUESTIONS PRESENTED FOR REVIEW

1. Does the construction industry proviso of 29 U.S.C., Section 158(e), immunize an agreement from the scope of the anti-trust laws, wherein:

   (a) An employer's association, (multi-employers), contracts, on behalf of its respective members, who comprise the majority of the local employers in the construction business and allied industries in Winnebago County, Illinois, with

(b) the representative, (Rockford Trades Council), of twenty (20) or so, antonomous, local Winnebago County unions, whose individual members are employed by the multi-employers, whereby said contracting parties:

(1) mutually agree to simultaneously impose and enforce, by economic coercion, if required, a boycott and "hot cargo" restriction, operative throughout the County of Winnebago, Illinois, (protected area), shop and construction site alike, upon all competing employers, (unrecognized employers), who do not enter into collective bargaining agreements with either the Rockford Trades Council, and/or its local member unions, having jurisdiction over the employer's particular field of endeavor.

(2) intend by their restrictive pact, to eliminate competition within the protected area from any and all unrecognized employers.

2. Does the Construction Industry Proviso override Your Honors' decision in the "Sand Door" case, *United Brotherhood of Carpenters and Joiners, et al.* v. *N.L.R.B.*, 357 U.S. 93, (1958), in that said legislation authorized labor's utilization of economic coercion to enforce the provisions of a construction site, hot cargo, and/or secondary boycott clause, contained in a collective bargaining agreement?

STATUTORY AND CONSTITUTIONAL LAW INVOLVED

29 U.S.C., Section 158(e)

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease

or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .*" (Emphasis added to set out construction industry proviso)

29 U.S.C., Section 157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title."

15 U.S.C., Section 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal."

15 U.S.C., Section 2

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of

trade or commerce among the several states or with foreign nations shall be deemed guilty of a misdemeanor. . . ."

29 U.S.C., Section 158(b)

"It shall be an unfair labor practice for a labor organization or its agents . . .

(4)(i) "to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work of any goods, articles, materials, or commodities or to perform services of

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

A. "forcing or requiring any employer or self-employed person to join any labor or employer organizations or to enter into any agreement which is prohibited by section 8(e).

B. "forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . .

D. "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade,

craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

STATEMENT OF CASE

Your Petitioners instituted the case at bar by filing their Complaint, containing three (3) counts, in the District Court for the Northern District of Illinois, Eastern Division.

In the first count, the Petitioner, Suburban Tile Center, Inc., (Suburban Tile), alleged that the Respondents entered into a combination to suppress competition among trade, craft, and/or construction contractors, and/or sub-contractors, and/or among trade, and/or craft, and/or construction unions, resulting in an unreasonable restraint upon trade, in violation of the Sherman Act. (Title 15 U.S.C., Section 1 and Section 2.)

Said count further alleged that said unreasonable restraint upon trade, resulted in injury to the public, from the lessening of competition, and specific damages to Petitioners. (JA 23)

The first count appears at (JA 6-25); and the amendment thereto appears at (JA 68-70).

The second count was initiated by the Petitioner, Suburban Tile, to recover for damages resulting from alleged economic coercion, constituting unfair labor practices, perpetrated by the Respondent Unions, in violation of the Labor-Management Relations Act, Title 29 U.S.C., Section 158(b), as authorized by Title 29 U.S.C.A., Section 187(b).

The third count is by the Petitioner, United Construction And Trades Union, Local #102, (Local #102), seeking to enjoin the continuation of said allegedly monopolistic contract, (restrictive pact), and for damages, as provided by the anti-trust laws, which it sustained by reason that its membership cannot obtain employment within the restricted area of Winnebago County, Illinois.

The essential facts are as follows:

On November 9th, 1962, the Respondent, Suarez Brothers Construction Co., Inc., (Suarez Brothers), a general contractor and the developer of the Presidential Courts Project, a thirty-eight (38) apartment building project, containing five hundred thirty-eight (538) apartments, to be constructed west of the Machesney Airport, Rockford, Illinois, entered into a written contract, (JA 52), with the Respondent, Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County, (which association consists of the representatives from approximately twenty (20) antonomous local area unions), hereinafter referred to as the "Rockford Trades Council".

Under the terms of said contract, Suarez Brothers agreed that "effective in all places where work is being performed, or to be performed, by . . . (Suarez Brothers)", and to include "all work by the various craft unions associated with the . . . (Rockford Trades Council) and within the territorial jurisdiction of said . . . (Rockford Trades Council), (JA 17, 18, 19), Suarez Brothers shall ". . . not do or sublet any work commonly done by the various craft unions, who are members of the . . . (Rockford Trades Council) to any person, firm, corporation or association not having a collective

bargaining agreement with the . . . (Rockford Trades Council) or the local craft unions associated with the . . . (Rockford Trades Council), which commonly has jurisdiction over the class of work."

About April of 1963, but in any event, prior to June 21st, 1963, the Respondent, Building Contractors Association of Rockford, Inc., (multi-employers), on behalf of its members, who comprise the major employers engaged both in the construction field, and in industries that render services for, and/or supply prefabricated products to, said construction employers, general contractors as well as subcontractors within the political subdivision of Winnebago County, Illinois, entered into an agreement, (restrictive pact), with the Rockford Trades Council, wherein said multi-employers agreed:

> "IV . . . effective in all places where any work is performed or to be performed . . . within the territorial jurisdiction of the Employer and each craft union affiliated with the . . . (Rockford Trades Council).
>
> V . . . not to sublet any work commonly done by the various craft unions who are members of the . . . (Rockford Trades Council), to any person, firm, corporation or association not having a collective bargaining agreement with the . . . (Rockford Trades Council) or the local craft union affiliated with the . . . (Rockford Trades Council) which commonly has jurisdiction over the class of work. It is further agreed that no journeyman or apprentice shall be required to work on any projects where other than craft union personnel affiliated with the aforesaid Council are employed.
>
> VI . . . that only contractors having contracts with the . . . (Rockford Trades Council) and its associate local unions will be used in the construction of its

projects erected within the common jurisdiction of the parties hereto.

Any Contractor not a member of any employer Association, may receive the benefits and assume the obligations of this Agreement by and with the Council by signing an exact copy of this Agreement." (JA 68-70).

The contract that appears at (JA 55) is an exact duplicate of the multi-employers agreement with the Rockford Trades Council, save for the insertion of the name, Suarez Brothers Construction Company, Inc., thereon.

On or about May 6th, 1963, the Petitioner, Suburban Tile, an Illinois corporation, with offices in Cook County, Illinois, and whose principal operations were within the Cook County area, entered into a sub-contract with Suarez Brothers to sell and install prefabricated tile, to be utilized in the Presidential Courts Project. (JA 12) All of Suburban Tile's employees were union members, the majority of whom belonged to Local #102. Suburban Tile did not have a collective bargaining agreement with the Rockford Trades Council, or with any local union affiliated with the Council. (JA 20).

On May 9th, 1963, Suburban Tile commenced the performance of its sub-contract with Suarez Brothers, (JA 12); shortly thereafter, the Rockford Trades Council ascertained that Suburban Tile's employees were not members of its local affiliated unions, and advised them they would not be allowed to work there. (JA 20)

Suburban Tile met with the Rockford Trades Council, on or about May 22nd, 1963; and because it did not meet the terms of the restrictive pact, it was informed

that it would not be permitted to perform its sub-contract with Suarez Brothers. (JA 21)

From time to time thereafter, prior to June 21st, 1963, the Rockford Trades Council, and the affiliated local unions, informed Suarez Brothers that Suburban Tile had not signed the restrictive pact, and threatened "to cause work stoppages, picketing, boycotts, and sue in the Federal Court for damages if . . . (Suburban Tile) . . . was not put off the job; . . . the Rockford Trades Council notified certain affiliated unions to walk off the Presidential Courts construction site unless and until . . . (Suburban Tile) contract was terminated, and pursuant therewith, certain affiliated unions and members thereof, did, in fact, cease working thereon." (JA 21)

On or about June 21st, 1963, Suarez Brothers signed an exact copy of the restrictive agreement that theretofore had existed by and between the multi-employers and the Rockford Trades Council, (JA 68, 69), thereby becoming a party to the alleged unlawful conspiracy. (JA 56, 58)

The occupations of the members of the local unions affiliated with Rockford Trades Council, are not limited exclusively to work to be performed at a construction site. (JA 9) Accordingly, said employees may work just as readily in a factory or shop, assembling finished and/or prefabricated products to be utilized ultimately at a construction site; and/or, as in the case of an affiliated truck drivers union, may deliver products to a construction site.

On June 28th, 1963, one week after Suarez Brothers had signed the restrictive pact, an uncontested, permanent injunction was entered in an action, initiated on June 26th, 1963, between the Rockford Trades Council, et al.

and Suarez Brothers, by the Circuit Court of Winnebago County, (JA 21, 22) perpetually restraining Suarez Brothers from hiring or sub-letting work to any person, firm, corporation, or association not having a collective bargaining agreement with the Rockford Trades Council or its affiliated local unions. (JA 59, 60). Suburban Tile was not made a party to said proceeding.

On June 29th, 1963, Suarez Brothers, by letter, directed Suburban Tile to stop doing the tile work on the Presidential Courts project. (JA 39)

Thereafter, proceedings were entertained by the National Labor Relations Board, (N.L.R.B.), in case No. 13-CC-374, concerning the foregoing matters. (JA 70-71).

On March 6th, 1964, a "settlement agreement", (JA 72-74), was effected by the N.L.R.B., nullifying the restrictive provisions, complained of in Suarez Brothers' contracts with the Rockford Trades Council, namely, provisions No. 3, 4, 5, and 6, of the agreement of November 9th, 1962, (JA 17, 18), and Articles IV, V, and VI, of the restrictive pact, a copy of which Suarez Brothers signed on June 21st, 1963. (JA 56, 57).

The settlement agreement, which provides, (JA 72), that it does not constitute an admission that an unfair labor practice has occurred, was never signed by Suburban Tile, the charging party, and only applied to said contracts signed by Suarez Brothers, rather than the multi-employers, whose contract with the Rockford Trades Council continued in force.

BASIS FOR FEDERAL JURISDICTION

The jurisdiction of the Federal Court in this matter is authorized pursuant with Title 15 U.S.C., Section 15, 38 Stat. 731, specifically providing for actions by persons injured by reason of anything forbidden in the anti-trust laws; and by Title 29 U.S.C., Section 187(a)(b), as amended September 14th, 1959, Pub. L. 86-257, Title VII, Section 704(e), 73 Stat. 545, specifically providing that an action may be commenced by anyone injured in his business by reason of the commission of an unfair labor practice by a labor organization, in violation of Section 158(b)(4). (Title 29 U.S.C. 158(b)(4).

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court below turned Congress' endeavor to further the rights of a laborer employed to toil at "the site of the construction, alteration, painting, or repair of a building, structure, or other work", 29 U.S.C., Section 158(e), (construction site proviso), into an awesome legalized obstruction upon the free flow of interstate commerce, resulting in disastrous ramifications upon our economy.

In its determination, the United States Court of Appeals for the Seventh Circuit, 354 F.2d 1, in the case at bar, was required to make a judicial interpretation of first impression, that is of major importance to the construction industry, relating to the territorial scope and contracting parties within the embrace of the legalized secondary boycott permitted by the construction site proviso. (PB 3, 4)

By doing violence to the rules of construction, as well as to the unambiguous wording of the construction site proviso, the Court of Appeals stretched "the site of the construction, alteration, painting, or repairing of *a building, structure or other work*", to include the entire protected area of Winnebago County, Illinois, shop, construction site, and/or any points betwixt and between, as well as permitting the multi-employers, to

squeeze into a *singular* "employer engaged in the construction industry."

> "A proviso which follows and restricts an enacting clause general in its scope should be strictly, but reasonably construed, so as to take out of the enacting clause only those acts which are fair within the terms of the proviso, and the burden of proof is one claiming . . . the benefit of the proviso." 28 C.J.S., Section 381, Page 886

Without quarreling with the obvious obstruction upon interstate commerce, occasioned by the conspirators' pact, the Court of Appeals took the position that it was powerless to deal with the same, inasmuch as Congress sanctioned the area-wide encumbrance upon the right of a trader's access to the markets of Winnebago County, Illinois, as imposed by the local industry herein, by the enactment of the construction site proviso, thereby removing the conspirators from the purview of the anti-trust laws.

The N.L.R.B. did not even consider the particular construction site issues involved herein, in Los Angeles Building and Construction Trades Council, et al., (1965), 151 N.L.R.B. No. 83, 58 L.R.R.M. 1490, relied upon by the Court of Appeals in its decision, 354 F 2d 1, 3, as approving agreements of the type involved in the case at bar, "even when not specifically limited to a particular construction site." Further, there was no multi-employer association, that represented the majority of the construction industry in a political subdivision of a state, involved as a party signatory to an area-wide secondary boycott agreement therein.

Alongside of its alleged shield, the construction site proviso, the Rockford Trade Council, et al., at page 31 of their Appellee's Brief, openly thrust forth the sabor-

toothed objective of the conspirators, namely, precluding so-called *"substandard employers from undercutting contractors with whom they have union contracts."*

Needless to say, all unrecognized employers, regardless of the welfare of their employees, automatically qualify under the terms of the restrictive pact, as sub-standard employers.

If the multi-employers unilaterally banded together for the purpose of boycotting unrecognized employers, Your Honors would unhesitatingly concur that theirs was a combination designed to suppress competition, resulting in an unreasonable restraint upon trade, in violation of the anti-trust laws.

Since this Honorable Court decided the landmark case of *Allen Bradley* v. *Local Union #3,* 325 U.S. 797, 89 L ed 1939, 65 S Ct. 1533, the participation of the local labor force cannot alter the substance of the violation.

In said cause, at 325 U.S. 798, 808, this Court held:

> ". . . It is a violation of the Sherman Anti-Trust Act for labor unions and the members, prompted by a desire to get and hold jobs for themselves at good wages and high working standards, to combine with employers and manufacturers of goods to restrain competition in, and to monopolize the marketing of goods.
>
> "Congress never intended that unions could, consistently with the Sherman Act, eliminate 'non-labor' groups to create business monopolies and to control the marketing of goods and services."

The Allen Bradley decision has been followed by this Court in numerous decisions. See *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 400, 411; *United*

States v. *Women's Sportswear Assn.*, 336 U.S. 460, 464; *Giboney* v. *Empire Storage*, 336 U.S. 490, 497; *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, 190; *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296; *Meat Drivers* v. *United States*, 371 U.S. 94, 99-101.

The Court below, somewhat naively, indicates that the monopoly of the local magnates is not impregnable, and hence, Allan Bradley is not applicable, inasmuch as any employer can theoretically work within the protected area of Winnebago County, Illinois, by signing a copy of the restrictive pact. However, before the closed markets become accessible to an unrecognized employer, he must see to it that his employees, who, for the most part, are skilled craftsmen, rather than itinerant unskilled laborers, change their union affiliation, and/or, if he is unsuccessful therein, replace them; of course, this he cannot do, by reason of Title 29 U.S.C., Section 157. (PB 4).

Although Suburban Tile cannot exercise or participate in the selection of an union for its employees, nevertheless, if the employees make the "wrong" choice, it can be prevented from working within a protected area. It would appear that Congress has certainly deprived Suburban Tile of its property rights, in violation of the Fifth Amendment to the United States Constitution, if the restrictive pact is found to be legalized by the construction site proviso.

From a practical standpoint, an employer who performs the bulk of his work beyond the protected area, would automatically be eliminated from Winnebago County, Illinois, as his employees would be organized by the local unions active in the area of his principal endeavors.

The following conversation, recorded at Page 1672, U.S. Taft-Hartley Act Revisions, 83 Congress 1st Hearings, Appendix, between the late Senator John F. Kennedy and Richard J. Gray, President of the A.F.L.-C.I.O. Building and Construction Trades Department, reflects upon the substantial economic pressure exerted upon a sub-contractor by the Building Trades Council, at a particular construction site, even when acting without the consort of the multi-employers, since the passage of Section 8(f), 29 U.S.C., Section 158(f), (A. 8a):

> "Senator Kennedy: We are not arguing whether unions are desirable. I think that is theoretical the way the building trades are set up, but I am thinking of a case where the sub-contractor, if we change it to 7 days and there was an election and they did not want to join a union, it seems to me that the way you argue that you would really put that sub-contractor out of business, because all of the rest of the union men would refuse to work with him, and theoretically, he would be forced to have his men join the union to stay in business, so the effect is a closed shop."
>
> "Mr. Gray: That is not so. Right in this town you have non-union contractors operating. We are not as powerful as to put a man out of business."

Congress never authorized the staggering coercive economic impact of the restrictive pact, that simultaneously wires the local area doors to all construction sites and sub-contractors' shops onto the same circuit, and exposes an unaffiliated employer to grievous financial hardship by the combine's flip of the switch.

So long as the decision of the Court below stands, an absolute, artificial barrier, erected in combination by the local magnates and their labor counterparts,

will firmly stand, precluding the entry of unrecognized contractors within the protected areas as an entirety. The agreement in the case at bar could well become a pattern; and if the proviso can render a county-wide, secondary boycott, hot cargo contract, legal, it could just as readily apply beyond, should the contracting parties be so oriented.

Whether the agreed tool, used by the contracting parties to a collective bargaining agreement, to place an unreasonable commercial obstruction upon the protected area, was the indirect means of jointly agreeing that the union would impose a wage schedule upon the business competitors of the contracting employers, that they could not meet, as in the *United Mine Workers* v. *Pennington, et al.,* 381 U.S. 657, 14 L.Ed.2d 626, 85 S.Ct. 1585, or the direct means of effecting an area-wide secondary boycott to prevent, what the Rockford Trades Council, et al. referred to on Page 31 of their Appellee Brief, filed in the United States Court of Appeals, as, "sub-standard employers from undercutting contractors with whom they have union contracts," the anti-trust immunity, by reason of the union exemption, is equally waived.

It was, of course, not only the objective of the local unions, that so-called "substandard" employers be excluded; but obviously, to the interest of the multi-employers as well.

The unlawful purpose of a union to aid business groups in restraining trade and attempting to monopolize markets is not cured by any co-existing purpose to serve legitimate union ends. *Allen Bradley Co.* v. *International Brotherhood of Electrical Workers,* 325 U.S.

805, 806, 89 L ed 1939, 65 S.Ct. 1533; *United Brotherhood of Carpenters & Joiners* v. *United States,* 330 U.S. 395, 91 L ed 973, 67 S.Ct. 775; *United States* v. *Employing Plasterers Asso.,* 347 U.S. 186, 198, 98 L ed 618, 74 S.Ct. 452; *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 94, 9 L ed 2d 150, 83 S.Ct. 162.

Unions have been held to violate the Sherman Act where agreements pursuant to collective bargaining have been the means by which the conspiracy was made and effected. *Allen Bradley Co.* v. *International Brotherhood of Electrical Workers,* 325 U.S. 797, 89 L ed 1939, 65 S.Ct. 1533; *United States* v. *American Tobacco Co.,* 221 U.S. 106, 55 L ed 663, 31 S.Ct. 632; *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809, 90 L ed 1575, 66 S.Ct. 1125; *United Brotherhood of Carpenters & Joiners* v. *United States,* 330 U.S. 395, 91 L ed 973, 67 S.Ct. 775; *United States* v. *Employing Plasterers Asso.,* 347 U.S. 186, 98 L ed 618, 74 S.Ct. 452; *Local 175, Brotherhood of Electrical Workers* v. *United States,* 219 F2d 431, cert den 349 U.S. 917, 99 L ed 1250, 75 S.Ct. 606; *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 97, 9 L ed 2d 150, 83 S.Ct. 162.

The following excerpts, from this Court's recent decision, *United Mine Workers of America* v. *Pennington, et al.,* 381 U.S. 657, 14 L ed 2d 626, 85 S.Ct. 1585, are fully applicable to the conspirator's restrictive pact herein:

At 14 L ed 2d 635:

> "From the view point of anti-trust policy, moreover all such agreements between a group of employers and a union, that the union will seek specified labor standards outside of the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case."

At 14 L ed 2d 635:

> "Thus the relevant labor and anti-trust policies compel us to conclude that the alleged agreement between U.M.W. and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the anti-trust laws."

As was stated by Your Honors, in *Meat Cutters Union, et al.*, v. *Jewel Tea Company, Inc.*, 381 U.S. 676, 14 L ed 640, 649, 85 S.Ct. 1596,

> ". . . exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policies of the labor laws. Employers and unions are required to bargain about wages, hours, and working conditions and this fact weighs heavily in favor of anti-trust exemption for agreements on these subjects. But neither party need bargain about other matters. . . ."

The restrictive pact between the two representative bodies, acting on behalf of the combined local construction industry and businesses that render services for, and supply products to it, both employer and employee alike, that precluded the entry of non-local, affiliated union, employers, from the area of their mutual operations, Winnebago County, Illinois, surely cannot qualify as a mandatory bargaining subject.

The anti-competitive commercial restraint imposed by the combine, which excluded certain employers from the markets under their control, is at the core of the type of activity to which the anti-trust laws are directed.

As Mr. Justice Douglas stated in his concurring opinion, in *United Mine Workers of America* v. *Pennington, et al.*, 381 U.S. 657, 14 L ed 2d 626, 642, 85 S.Ct. 1585:

". . . Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence."

"The only architect of our economic system is Congress. We are right in adhering to its philosophy of the free enterprise system as expressed in the anti-trust laws and as enforced by *Allen-Bradley* v. *Union, supra,* until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here."

Neither the construction site proviso, nor the presence of the local organized labor force, as a party to the restrictive commercial agreement in the case at bar, or as the agency that successfully brought about this combination, if that be the case, since *Allen Bradley Co.* v. *Union,* 325 U.S. 797, could remove the combination from the scope of the anti-trust laws.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

In *National Labor Relations Board* v. *International Brotherhood of Teamsters, et al.,* 342 F.2d 18, 21, 22, (1965), the United States Court of Appeals for the Second Circuit, contrary to the United States Court of Appeals for the Seventh Circuit, in the case at bar, held that:

"The 'construction industry' proviso to section 8(e) . . . is limited to 'work done at the site of the construction', (and) it does not sanction a 'boycott against suppliers who do not work on the job site."

> "Island Dock did not 'work on the job site', but merely made deliveries to Wikstrom at the Cementon site. This is significant because the legislative history indicates that the proviso was not intended to protect agreements relating to supplies transported to and delivered on the construction site. 1 Leg. Hist. 943 (1959). Here the act of mixing previously loaded ingredients in the ready-mix trucks once they reached the project, relied upon by Local 249 as on site work, was, . . . merely the final act of the delivery process."

The restrictive pact, upheld by the Court below on the basis of the construction site proviso, requires the multi-employers to refrain from dealing with all unrecognized employers, so long as the work is covered by the occupations of the Rockford Trades Council's local affiliates, whether it is to be performed wholly in the shop, or at the construction site.

III.

THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE DECISION OF THIS HONORABLE COURT IN UNITED BROTHERHOOD OF CARPENTERS & JOINERS, ET AL. V. N.L.R.B., (SAND DOOR & PLYWOOD CO.), 357 U.S. 93, (1958).

In Count II, Suburban Tile alleges that economic coercion was utilized by the Rockford Trades Council and its affiliated local unions, to require Suarez Brothers to comply with its contract of November 9th, 1962, with the Rockford Trades Council, and to cause Suarez Brothers to terminate its contract with Suburban Tile. (JA 21).

The Court of Appeals failed to recognize that the construction site proviso was not intended by Congress to override the holding of this Court in *United Brotherhood of Carpenters, et al.* v. *N.L.R.B.,* (Sand Door &

Plywood Co.), 357 U.S. 98, 105 (1958), to the effect that the employer was intended to have "a freedom of choice at the time the question of whether to boycott or not arises and that coercive measures could not be effected upon the employer to force him to comply with a secondary boycott provision of his contract."

As was stated by Senator Kennedy, in discussing the construction site proviso to Section 8(e), at 105 Congressional Record 16415:

> "Agreements by which a contractor in the construction industry promises not to sub-contract work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under Section 8(e) . . . since the proviso does not relate to Section 8(b)(4), strikes and picketing to force the contracts accepted by the proviso will continue to be illegal under Section 8(b)(4).
>
> "It is not intended to change the law with respect to the judicial enforcement of these contracts. . . ."

In *Building & Construction Trades Council of San Bernadino, et al.* v. *N.L.R.B.*, 328 F.2d 540, 541 (1964), the court held specifically that:

> "Economic action used to enforce a sub-contracting clause which implicitly blacklisted all non-union sub-contractors, violated Section 8 (b)4(i)(ii)(B)."

In *Essex County and Vicinity District Council of Carpenters and Millrights, et al.* v. *N.L.R.B.*, 332 F.2d 636, (1964), a strike on the part of a union *to obtain* a provision in a union agreement with an individual employer on a construction site permitting union employees to refuse to work and engage in a secondary boycott when a "non-union situation exists" was held legal. However, the Court, on page 641, went on to say that:

"We should add that such an agreement is not a defense to an unfair labor practice charge made under Section 8(b)(4)(B)."

"The building and construction industry is an 'industry effecting commerce' within the meaning of Section 142 of this Title, making it an unfair practice for a labor organization to threaten a person engaged in 'commerce or an industry affecting commerce' with an object of requiring said person to cease doing business with any other person or requiring any other employer to recognize or bargain with the labor organization." *N.L.R.B.* v. *International Union of Operating Engineers, Local 571,* C.A. Neb. 1963, 317 F.2d 638.

Clearly, such activity constituted an unfair labor practice, in violation of the Labor-Management Relations Act of 1947, as amended; and accordingly, Count II of the Plaintiff's Complaint, as amended, is certainly actionable and should not have been dismissed.

CONCLUSION

Our free enterprise system has been grossly encroached upon by the misinterpretation of the scope of the construction site proviso, by the Court below, which legalized a monopolistic combination of organized labor and organized business and granted to it absolute control over the local area construction markets.

The area-wide restrictive boycott, imposed by the multi-employers and the Rockford Trades Council, upon competing, unorganized employers, is at the core of the activity at which the anti-trust laws are aimed.

The Court of Appeals was in error when it concluded that Congress intended to sanction the conspirator's conduct and agreements, relating to work performed at the shop as well as the construction site, by the enactment of the construction site proviso.

The construction site proviso does not authorize labor's utilization of coercion (walk-offs, picketing, etc.) to enforce the provisions of a hot cargo clause, and/or a secondary boycott provision, contained in a collective bargaining agreement against the signatory employer.

For the foregoing reasons, petitioners respectfully request that this Honorable Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

No. 14915

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Plaintiffs-Appellants,

v.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; CLARENCE DRUGER, Individually and as President of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; GEORGE IBEN, Individually and as Vice-President of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; EARL HIRTH, Individually and as Recording Secretary of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County, a Voluntary Unincorporated Association, For and on Behalf of the Independent Trade and Craft Unions of the A.F.L.-C.I.O, affiliated with Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; and the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL #792, A.F.L.-C.I.O., of Rockford, Illinois, and the MARBLE, TILE AND TERRAZZO WORKERS, MEMBERS OF SUBORDINATE UNION #31 of Rockford, Illinois; BUILDING CONTRACTORS ASSOCIATION OF ROCKFORD, INC., a corporation, MERLE F. DRAGER, Individually and and as Secretary of Building Contractors Association of Rockford, Inc., SUAREZ BROTHERS CONSTRUCTION CO., INC., a corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 30, 1965

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* The District Court sustained the motions of the defendants-appellees to dismiss the complaint, as amended, of the plaintiffs-appellants Suburban Tile Center, Inc., a corporation, and United Construction and Trades Union, Local #102, and this appeal followed.

Plaintiff's complaint sets out three counts. The first count alleges that:

> "[T]he defendants • • • entered into a combination to suppress competition among trade, craft and/or construction contractors and/or subcontractors, and/or among trade and/or craft and/or construction unions, resulting in an unreasonable [restraint] upon trade and in violation of Sections 1 and 2 of the Sherman Act • • •."

The second count concerns plaintiff Suburban Tile Center, Inc., and alleges unfair labor practices of the defendant unions in violation of the Labor-Management Relations Act of 1947, as amended.

The third count, concerning plaintiff United Construction and Trades Union, Local #102, seeks an injunction and damages under the anti-trust laws.

Plaintiffs assert that defendant Building Contractors Association of Rockford, Inc., which represents a majority of the contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois, (hereinafter sometimes called the "Contractors' Association") entered into an agreement with defendant Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County (which consists of representatives of about twenty local unions, including defendant United Brotherhood of Carpenters and Joiners of America, Local 792 of Rockford, Illinois, and the Marble, Tile and Terrazzo Workers, Members of Subordinate Union #31 of Rockford, Illinois) hereinafter sometimes called the "Trades Council."

Plaintiffs further allege that the agreement precluded the signatory contractors from contracting for work commonly done by the craft union members of the Trades Council with anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union (affiliated with the Trades Council) which commonly has jurisdiction over the class of work involved. The agreement provided that any contractor who was not a member could receive the benefits and assume the obligations of the agreement by signing an exact copy of it.

The plaintiffs assert that defendant Suarez Brothers Construction Co., Inc., (hereinafter sometimes called "Suarez Bros.") became a party to the alleged unlawful conspiracy by signing what was in effect an exact duplicate of the agreement on or about June 21, 1963. There was a prior similar collective bargaining agreement entered into between Suarez Bros. and the Trades Council on November 9, 1962, with reference to "the construction of apartment buildings project, west of Machesney Airport, Rockford, Illinois."

On or about May 6, 1963, plaintiff Suburban Tile Center, Inc., with its principal offices in Cook County, Illinois, (hereinafter sometimes called "Suburban Tile") entered into an agreement with Suarez Bros. as general contractor, to sell and install prefabricated tile at an apartment building project west of the Machesney Airport, Rockford, Illinois, known as the "Presidential Courts Project."

Plaintiffs assert that because of threats of such steps as work stoppages and lawsuits, by members of the local unions affiliated with the Trades Council, Suarez Bros. entered into the above-mentioned agreement of June 21, 1963.

Thereafter, the Trades Council sought and secured a court injunction from the Circuit Court of Winnebago County, Illinois, permanently enjoining Suarez Bros. from hiring or subletting work to persons or firms having no collective bargaining agreement with the Trades Council or its union affiliates. Suarez Bros. then directed plain-

tiff Suburban Tile to cease doing the work at the Presidential Courts Project site.

As indicated above, Suburban Tile views the economic coercion of the defendant unions directed against Suarez Bros. to secure discharge of Suburban Tile as an unfair labor practice: an illegal secondary boycott. The plaintiff union asserts that its members (who are not members of local unions affiliated with the Trades Council) have been foreclosed from engaging in their lawful occupations in the County of Winnebago unless they join such local unions.

The plaintiffs characterize the basic agreement as a combination of labor and its employers which exceeds the scope of Title 29 U.S.C.A. §158(e) and thus violates the anti-trust laws.

Section 158(e) as amended in 1959 does make it an unfair labor practice for a labor organization and an employer to agree to cease doing business with another employer. But a proviso to that section specifically excludes "an agreement between a labor organization and an employer in the construction industry relating to contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure or other work * * *." It thus appears that for the construction industry, Congress has approved such contracts as the one now before us.

The National Labor Relations Board has approved agreements of this type even when not specifically limited to a particular construction site. *Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co., et al.)* (1965) 151 NLRB No. 83, 58 LRRM 1490.

A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. *Orange Belt District Council of Painters No. 48* v. *N.L.R.B.*, D.C. Cir., 1964, 328 F. 2d 534, 537; *Building and Construction Trades Council of San Bernardino & Riverside Counties* v. *N.L.R.B.*, D.C. Cir., 1964, 328 F. 2d 540. Economic action

to secure such agreements has been allowed. *Essex County and Vicinity District Council of Carpenters etc. v. N.L.R.B.*, 3 Cir., 1964, 332 F. 2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383* v. *N.L.R.B.*, 9 Cir., 1963, 323 F. 2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws.

The plaintiffs rely on *Allen Bradley* v. *Local Union #3*, 325 U.S. 797. The Court there held that complicity of a labor organization in an otherwise unlawful conspiracy in restraint of trade did not cure the illegality of the conspiracy. The plaintiffs take the position that a unilateral agreement in these same terms among the contractors alone would have constituted an unreasonable restraint of trade. They then reason that adding the trade unions as parties to that agreement would not operate to avoid violation of the anti-trust laws. Having concluded that the agreement was a restraint on trade, they argue that it was immaterial whether or not the labor unions acted in their own self interest so long as both employers and employees benefited from the restraint.

In the plaintiffs' view the contractors enjoy a benefit from these agreements in that competition from outside contractors is limited by them. However, the agreements all provide that any contractor or sub-contractor may enter into similar collective bargaining agreements. In *Allen Bradley*, a complete monopoly was achieved (325 U.S. 800); that is not the case here. On the other hand, opportunities for employment of members of non-affiliated unions are limited to the advantage of the members of the defendant unions. We believe that the plaintiffs' reliance on *Allen Bradley* is misplaced.

We consider the foregoing to be completely dispositive of this case, and we, therefore, do not reach the other contentions of the various defendants that injuries arising from compliance with an injunction cannot support recovery in a private anti-trust suit; that the plaintiff union is a voluntary unincorporated association which is not the real party in

interest and which lacks capacity to sue under the anti-trust laws; that the N.L.R.B. has exclusive jurisdiction over conduct allegedly violative of the Labor-Management Relations Act; that the plaintiffs have failed to bring the unnamed local unions affiliated with the Trades Council and their individual members before the Court by service of process; and that the complaint fails to allege facts sufficient to give fair notice of the claims against the Contractors' Association or Merle F. Drager, its secretary.

The judgment of the District Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Tuesday, January 4, 1966

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

SUBURBAN TILE CENTER, INC., et al.
Plaintiffs-Appellants,

No. 14915 *vs.*

ROCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

29 U.S.C. § 158 (f):

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a) (3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159 (e) of this title. As amended Sept. 14, 1959 Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)—(c), 705(a), 73 Stat. 525, 542, 545. 29 U.S.C. § 158(f).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1169

SUBURBAN TILE CENTER, INC., A CORPORATION, AND UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners,

vs.

ROCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, ROCKFORD, ILLINOIS, WINNEBAGO COUNTY, ET AL.,

Respondents.

BRIEF FOR RESPONDENT UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 792, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Should this Court properly review the decision of the Court below which upheld the validity of a Building and Construction Subcontracting Agreement entered into pursuant to Section 8(e) of the Labor-Management Relations Act, and its subsequent judicial enforcement?	2
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BRIEF FOR RESPONDENT UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 792, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

This Brief in Opposition is submitted on behalf of the Respondent United Brotherhood of Carpenters and Joiners of America, Local 792 (hereinafter referred to as the "Carpenters").

QUESTION PRESENTED.

Should this Court properly review the decision of th Court below which upheld the validity of a Building an Construction Subcontracting Agreement entered into pur suant to Section 8(e) of the Labor-Management Relation Act, and its subsequent judicial enforcement.[1]

---

1. It should be noted that the instant Respondent, while reserv ing all rights thereto, does not herein discuss other issues whic were not decided by the Court of Appeals. As stated by the Cour at page 6 of its Opinion:

> We consider the foregoing to be completely dispositive of thi case, and we, therefore, do not reach the other contention of the various defendants that injuries arising from compliance with an injunction cannot support recovery in a private anti trust suit; that the plaintiff union is a voluntary unincor porated association which is not the real party in interest an which lacks capacity to sue under the anti-trust laws; that th N. L. R. B. has exclusive jurisdiction over conduct allegedl violative of the Labor-Management Relations Act; that th plaintiffs have failed to bring the unnamed local unions affili ated with the Trades Council and their individual member before the Court by service of process; and that the complain fails to allege facts sufficient to give fair notice of the claim against the Contractors' Association or Merle F. Drager, it secretary.

STATEMENT OF THE CASE.[2]

Petitioners, Suburban Tile Center, Inc., and United Construction and Trades Union, Local #102,[3] commenced this action by the filing of a joint Complaint in which the Petitioners sought damages from the Respondents for the alleged violation of the Anti-Trust Laws as well as a temporary and permanent injunction[4] (JA. pp. 6-39). In addition, Suburban Tile sought damages against the Respondent labor organizations for alleged violations of the Labor-Management Relations Act, as amended[5] (JA. pp. 25-30).[6]

---

2. All joint Appendix Citations are herein referred to as "(JA. p. ....)".

3. The Petitioner, Suburban Tile Center, Inc., (hereinafter refered to as "Suburban Tile"), is alleged as a corporation which was a sub-contractor engaged in the installation of tile at the Presidential Courts Project (JA. p. 7). The Petitioner, Local 102, United Construction and Trades Union, (hereinafter refered to as "Local 102"), is alleged as a labor organization having a collective bargaining agreement with Suburban Tile (JA. p. 28).

4. 15 USC § 1 *et seq.*

5. The Respondent Rockford Building and Construction Trades Council, (AFL-CIO), (hereinafter referred to as the "Trades Council"), is alleged as a voluntary unincorporated association consisting of representatives of about twenty local unions, including the Respondent United Brotherhood of Carpenters and Joiners of America, (AFL-CIO), (hereinafter referred to as the "Carpenters"), and Marble, Tile and Terrazzo Workers, Local 31, (hereinafter referred to as "Local 31") (JA. pp. 9, 10). In addition, another Respondent, Suarez Brothers Construction Co., Inc., (hereinafter referred to as "Suarez Brothers") was the general contractor on the Presidential Courts Project who sublet the tile installation work to the Petitioner, Suburban Tile (JA. pp. 10-12).

6. 29 USC § 141 *et seq.*

Findings of the Court Below.[7]

The Court found that all three Counts of the Complaint were concerned with a Building and Construction Industry Subcontracting Agreement entered into between the Respondent Trades Council and the Association[8] pursuant to the provisions of Section 8(e) of the Labor-Management Relations Act, as amended (Op. p. 2).

As stated by the Court at page 4 of its Opinion:

> Section 158(e) as amended in 1959 does make it an unfair labor practice for a labor organization and an employer to agree to cease doing business with another employer. But a proviso to that section specifically excludes "an agreement between a labor organization and an employer in the construction industry relating to contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure, or other work * * *." It thus appears that for the construction industry, Congress has approved such contracts as the one now before us.

The Court further held, and as the Petitioners admit,[9] any contractor who desired, including Suburban Tile, could become a party to the Construction Industry Agreement (Op. pp. 5-6; JA. pp. 68-70; Pet. 16).[10]

---

7. The Opinion of the Court below is printed in its entirety in the Appendix hereof (Pages 1 through 6). All such references to the Opinion shall be "(Op. p. ....)". The opinion is also reported in 354 F. 2d 1 (CA 7, 1965).

8. The Respondent Building Contractors Association of Rockford, Inc., (herein referred to as the "Association") is alleged as an Illinois Corporation, comprised of various contractors and subcontractors (JA. p. 10).

9. All references to the Petition for Writ of Certiorari shall be "(Pet. ....)".

10. The specific provision of the Agreement as alleged in the Complaint provided that:

> Any contractor not a member of any employer association may receive the benefits and assume the obligations of this agreement by and with the council by signing an exact copy of this agreement. (JA. pp. 68-70.)

Additional Facts.

On May 6, 1963 Suarez Brothers, the general contractor, subcontracted the installation of tile at the Presidential Courts Project to Suburban Tile (Op. p. 3; JA. p. 12).

Thereafter, on June 21, 1963, Suarez Brothers, who was not a member of the Association, became a party to a Construction Industry Subcontracting Agreement with the Trades Council[11] (Op. p. 3; JA. pp. 55-58).[12]

After Suarez Brothers signed that Agreement, the Trades Council sought and obtained an injunction in the Circuit Court of Winnebago County (JA. pp. 40-52, 22, 59-60). As stated by the Court at page 4 of its Opinion:

> Thereafter, the Trades Council sought and secured a court injunction from the Circuit Court of Winnebago County, Illinois, permanently enjoining Suarez Bros. from hiring or subletting work to persons or firms having no collective bargaining agreement with the Trades Council or its union affiliates. Suarez Bros. then directed plaintiff Suburban Tile to cease doing the work at the Presidential Courts Project site.

The decree was entered on June 28, 1963 and accordingly, on the following day, June 29, 1963, Suburban Tile was notified by Suarez Brothers to cease doing work at the construction site (Op. p. 4; JA. pp. 39, 59-60; Pet. 10-11).

---

11. As stated by the Court:

> The plaintiffs assert that defendant Suarez Brothers Construction Co., Inc., (hereinafter sometimes called "Suarez Bros.") became a party to the alleged unlawful conspiracy by signing what was in effect an exact duplicate of the agreement on or about June 21, 1963. There was a prior similar collective bargaining agreement entered into between Suarez Bros. and the Trades Council on November 9, 1962, with reference to "the construction of apartment buildings project, west of Machesney Airport, Rockford, Illinois."

12. The Court referred in its opinion to Suburban Tile's assertion that because of threats of such steps as work stoppages and law suits by members of the local Unioins affiliated with the Trades Council, Suarez Brothers entered into the above mentioned agreement on June 21, 1963 (Op. p. 3).

REASONS FOR NOT GRANTING THE WRIT.

The Decision in This Case Is Consistent With the Decisions of This Court and Lower Federal Courts.

The Petition for Writ of Certiorari is predicated upon an alleged conflict between the instant decision and certain decisions of this Court and of other courts. The Opinion of the Court of Appeals, however, shows that no such conflict exists and that this case and the cases cited by Petitioners were decided upon precisely the same principles of law.

Both the District Court and the Court of Appeals were confronted with a Complaint alleging damages arising from a Building and Construction Industry Subcontracting Agreement entered into pursuant to the Construction Industry Proviso of Section 8(e) of the Labor-Management Relations Act, as amended, and its subsequent judicial enforcement.

The Court below concluded that pursuant to the Proviso to Section 8(e), Congress has permitted subcontracting agreements in the construction industry and that such an agreement was before the Court (Op. p. 4). Oddly enough, the Petitioners conveniently omitted that Proviso from the allegations of their Complaint (JA. pp. 29-30).

The Court further held that based upon said agreement the Trades Council sought and secured an injunction in the Circuit Court of Winnebago County, Illinois, to restrain the general contractor, Suarez Brothers, from continuing to subcontract the tile installation work to the Petitioner, Suburban Tile (Op. p. 4; JA. pp. 40-52, 22, 59-60). Accordingly, Suarez Brothers then terminated Suburban Tile's subcontract and Suburban Tile and its Union, Local 102, left the job (JA. p. 39).

The Petitioners attempt to demonstrate that the instant decision is inconsistent with *Allen Bradley* and other deci-

sions of this Court. However, the Court below fully contemplated *Allen Bradley* as it specifically related to the allegations of the complaint at pages 5-6 of the Opinion as follows:

> In the plaintiffs' view the contractors enjoy a benefit from these agreements in that competition from outside contractors is limited by them. However, *the agreements all provide that any contractor or sub-contractor may enter into similar collective bargaining agreements.* In *Allen Bradley,* a complete monopoly was achieved (325 U. S. 800); that is not the case here. *On the other hand, opportunities for employment of members of non-affiliated unions are limited to the advantage of the members of the defendant unions.* We believe that the plaintiffs' reliance on Allen Bradley is misplaced. (Emphasis Supplied.)

As found by the Court below, these agreements all provided that any contractor or subcontractor, including Suburban Tile, could assume the obligations and receive the benefits thereunder by signing same (Op. pp. 5-6; JA. pp. 68-70).

Suburban Tile was affected by the agreement only because of its relationship with its own Union—Local 102. This was simply a question of competition between the AFL-CIO affiliated unions and the non-affiliated union, Local 102. As Suburban Tile itself admits, it did not desire to become a signatory to the Building and Construction Industry Subcontracting Agreement herein because of its own Local Union, Local 102 (Pet. 16, 20).

Moreover, unlike questions which were presented in recent decisions of this Court as cited by the Petitioners,[13] the Construction Industry Subcontracting Agreement is a mandatory subject of collective bargaining. As stated by the Court below in its Opinion at page 6:

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13. *United Mine Workers of America* v. *Pennington,* et al., 381 U. S. 657, (1965); and *Meat Cutters Union, et al.,* v. *Jewel Tea Company, Inc.,* 381 U. S. 676 (1965).

> A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. *Orange Belt District Council of Painters No. 48* v. N. L. R. B., D. C. Cir., 1964, 328 F. 2d, 534, 537; *Building and Construction Trades Council of San Bernadino & Riverside Counties* v. *N. L. R. B.;* D. C. Cir., 1964, 328 F. 2d 540.

In addition, the effect of these agreements on "non-union contractors" is fully contemplated by the law. As stated by Senator Kennedy in the Congressional Record, 105 Daily Cong. Rec. 16415, September 8, 1959:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a *non-union contractor* appear to be legal today. They will not be unlawful under Section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them. . . . (Emphasis Supplied.)

Finally, the Petitioners assert that the instant decision is in conflict with a decision of the Second Circuit and another decision of this Court.[14] However, contrary to the facts in those cases and as found by the Court below, what was involved herein was nothing more than an 8(e) Construction Industry Subcontracting Agreement, secured by activity permitted by the law[15] and enforced by judicial decree as

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14. *National Labor Relations Board* v. *International Brotherhood of Teamsters, et al.,* 342 F. 2d 19 (C. A. 2d, 1965); *United Brotherhood of Carpenters and Joiners, et al.,* v. *N. L. R. B.,* 357 U. S. 93, (1958).

15. As the Court below held at page 5 of its Opinion:
Economic action to secure such agreements has been allowed. *Essex County and Vicinity District Council of Carpenters etc.,* v. *N. L. R. B.,* 3 Cir., 1964, 332 F. 2d 636, 641, *Construction Production & Maintenance Laborers Union Local 383* v. *N. L. R. B.,* 9 Cir., 1963, 323 F. 2d 422, 425.

fully contemplated by the Labor-Managementn Relations Act, as amended.[16]

Under a claim of conflict with other decisions, Petitioners merely seek an additional review of the pleadings concerning the determination of the District Court which was unanimously affirmed by the Court of Appeals. This case is not an appropriate one for certiorari since it represents application of a statute—Section 8(e) Construction Proviso —to the allegations of the Complaint which clearly on its face comes within the protection of said Proviso.

Moreover, the determinations of the Court of Appeals and the District Court were firmly supported by the briefs and arguments of all parties. The Petition presents no valid ground specified in Rule 19 for issuance of the Writ.

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16. The judicial enforcement of the agreement was contemplated by Congress when it passed the Construction Industry Proviso to Section 8(e). As stated by the Extension of Remarks introduced by Senator Goldwater in the Congressional Appendix, September 24, 1959, A.8359:

> But a Building-Trades Union may enter into a contract with a contractor—building contractor—whereby he agrees that he will not let the work to any subcontractor who is non-union. This is not illegal. Now here's what it may do:
>
> *The Union may go into a Court and sue him if he fails to live up to that agreement. . . .* (Emphasis Supplied.)

CONCLUSION.

For the reasons stated herein, the Respondent Carpenters request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Court of Appeals Decision 1

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965.

No. 14915

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADE UNION, LOCAL #102.

Plaintiffs-Appellants,

v.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; CLARENCE DRUGER, Individually and as President of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; GEORGE IBEN, Individually and as Vice-President of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; EARL HIRTH, Individually and as Recording Secretary of Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County, a Voluntary Unincorporated Association, For and on Behalf of the Independent Trade and Craft Unions of the A.F.L.-C.I.O., affiliated with Rockford Building and Construction Trades Council, A.F.L.-C.I.O., Rockford, Illinois, Winnebago County; and the UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL #792, A.F.L.-C.I.O., of Rockford, Illinois, and the MARBLE, TILE AND TERRAZZO WORKERS, MEMBERS OF SUBORDINATE UNION #31 of Rockford, Illinois; BUILDING CONTRACTORS ASSOCIATION OF ROCKFORD, INC., a corporation, MERLE F. DRAGER, Individually and as Secretary of Building Contractors Association of Rockford, Inc., SUAREZ BROTHERS CONSTRUCTION CO., INC., a corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 30, 1965

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

KNOCH, *Circuit Judge.* The District Court sustained the motions of the defendants-appellees to dismiss the complaint, as amended, of the plaintiffs-appellants Suburban Tile Center, Inc., a corporation, and United Construction and Trades Union, Local #102, and this appeal followed.

Plaintiffs' complaint sets out three counts. The first count alleges that:

> "[T]he defendants * * * entered into a combination to suppress competition among trade, craft and/or construction contractors and/or subcontractors, and/or among trade and/or craft and/or construction unions, resulting in an unreasonable [restraint] upon trade and in violation of Sections 1 and 2 of the Sherman Act * * *."

The second count concerns plaintiff Suburban Tile Center, Inc., and alleges unfair labor practices of the defendant unions in violation of the Labor-Management Relations Act of 1947, as amended.

The third count, concerning plaintiff Union Construction and Trades Union, Local #102, seeks an injunction and damages under the anti-trust laws.

Plaintiffs assert that defendant Building Contractors Association of Rockford, Inc., which represents a majority of the contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois (hereinafter sometimes called the "Contractors' Association"), entered into an agreement with defendant Rockford Building and Construction Trades Council of Rockford, Illinois, Winnebago County (which consists of representatives of about twenty local unions, including defendant United Brotherhood of Carpenters and Joiners of America, Local 792 of Rockford, Illinois, and

the Marble, Tile and Terrazzo Workers, Members of Subordinate Union #31 of Rockford, Illinois) hereinafter sometimes called the "Trades Council."

Plaintiffs further allege that the agreement precluded the signatory contractors from contracting for work commonly done by the craft union members of the Trades Council with anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union (affiliated with the Trades Council) which commonly has jurisdiction over the class of work involved. The agreement provided that any contractor who was not a member could receive the benefits and assume the obligations of the agreement by signing an exact copy of it.

The plaintiffs assert that defendant Suarez Brothers Construction Co., Inc. (hereinafter sometimes called "Suarez Bros."), became a party to the alleged unlawful conspiracy by signing what was in effect an exact duplicate of the agreement on or about June 21, 1963. There was a prior similar collective bargaining agreement entered into between Suarez Bros. and the Trades Council on November 9, 1962, with reference to "the construction of apartment buildings project, west of Machesney Airport, Rockford, Illinois."

On or about May 6, 1963, plaintiff Suburban Tile Center, Inc., with its principal offices in Cook County, Illinois (hereinafter sometimes called "Suburban Tile"), entered into an agreement with Suarez Bros. as general contractor, to sell and install prefabricated tile at an apartment building project west of the Machesney Airport, Rockford, Illinois, known as the "Presidential Courts Project."

Plaintiffs assert that because of threats of such steps as work stoppages and lawsuits, by members of the local unions affiliated with the Trades Council, Suarez Bros. entered into the above-mentioned agreement of June 21, 1963.

Thereafter, the Trades Council sought and secured a court injunction from the Circuit Court of Winnebago County, Illinois, permanently enjoining Suarez Bros. from hiring or subletting work to persons or firms having no collective bargaining agreement with the Trades Council or its union affiliates. Suarez Bros. then directed plaintiff Suburban Tile to cease doing the work at the Presidential Courts Project site.

As indicated above, Suburban Tile views the economic coercion of the defendant unions directed against Suarez Bros. to secure discharge of Suburban Tile as an unfair labor practice: an illegal secondary boycott. The plaintiff union asserts that its members (who are not members of local unions affiliated with the Trades Council) have been foreclosed from engaging in their lawful occupations in the County of Winnebago unless they join such local unions.

The plaintiffs characterize the basic agreement as a combination of labor and its employers which exceeds the scope of Title 29 U. S. C. A. § 158(e) and thus violates the antitrust laws.

Section 158(e) as amended in 1959 does make it an unfair labor practice for a labor organization and an employer to agree to cease doing business with another employer. But a proviso to that section specifically excludes "an agreement between a labor organization and an employer in the construction industry relating to contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure or other work * * *." It thus appears that for the construction industry, Congress has approved such contracts as the one now before us.

The National Labor Relations Board has approved agreements of this type even when not specifically limited

to a particular construction site. *Los Angeles Building and Construction Trades Counsel (Fowler-Kenworthy Electric Co., et al.)* (1965), 151 NLRB No. 83, 58 LRRM 1490.

A construction subcontracting agreement has been held to be a mandatory subject of collective bargaining. *Orange Belt District Council of Painters No. 48* v. *N. L. R. B.*, D. C. Cir., 1964, 328 F. 2d 534, 537; *Building and Construction Trades Council of San Bernadino & Riverside Counties* v. *N. L. R. B.*, D. C. Cir., 1964, 328 F. 2d 540. Economic action to secure such agreements has been allowed. *Essex County and Vicinity District Council of Carpenters etc.* v. *N. L. R. B.*, 3 Cir., 1964, 332 F. 2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383* v. *N. L. R. B.*, 9 Cir., 1963, 323 F. 2d 422, 425. In the face of these decisions, it would be unreasonable to hold that success in securing such an agreement constitutes a violation of the anti-trust laws.

The plaintiffs rely on *Allen Bradley* v. *Local Union #3*, 325 U. S. 797. The Court there held that complicity of a labor organization in an otherwise unlawful conspiracy in restraint of trade did not cure the illegality of the conspiracy. The plaintiffs take the position that a unilateral agreement in these same terms among the contractors alone would have constituted an unreasonable restraint of trade. They then reason that adding the trade unions as parties to that agreement would not operate to avoid violation of the anti-trust laws. Having concluded that the agreement was a restraint on trade, they argue that it was immaterial whether or not the labor unions acted in their own self interest so long as both employers and employees benefited from the restraint.

In the plaintiffs' view the contractors enjoy a benefit from these agreements in that competition from outside contractors is limited by them. However, the agreements all provide that any contractor or sub-contractor may enter

into similar collective bargaining agreements. In *Allen Bradley,* a complete monopoly was achieved (325 U. S. 800); that is not the case here. On the other hand, opportunities for employment of members of non-affiliated unions are limited to the advantage of the members of the defendant unions. We believe that the plaintiffs' reliance on *Allen Bradley* is misplaced.

We consider the foregoing to be completely dispositive of this case, and we, therefore, do not reach the other contentions of the various defendants that injuries arising from compliance with an injunction cannot support recovery in a private anti-trust suit; that the plaintiff union is a voluntary unincorporated association which is not the real party in interest and which lacks capacity to sue under the anti-trust laws; that the N. L. R. B. has exclusive jurisdiction over conduct allegedly violative of the Labor-Management Relations Act; that the plaintiffs have failed to bring the unnamed local unions affiliated with the Trades Council and their individual members before the Court by service of process; and that the complaint fails to allege facts sufficient to give fair notice of the claims against the Contractors' Association or Merle F. Drager, its secretary.

The judgment of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

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Office-Supreme Court, U.S.
FILED
MAY 14 1966
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

No. 1169

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL NO. 102,

Petitioners, Appellants Below,

vs.

BUILDING CONTRACTORS ASSOCIATION OF ROCKFORD, INC., a corporation, MERLE F. DRAGER, Individually and as Secretary of the Building Contractors Association of Rockford, Inc., etal,

Respondents, Appellees Below.

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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In the

Supreme Court of the United States

No.

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL NO. 102,

Petitioners, Appellants Below,

vs.

BUILDING CONTRACTORS ASSOCIATION OF ROCKFORD, INC., a corporation, MERLE F. DRAGER, Individually and as Secretary of the Building Contractors Association of Rockford, Inc., etal,

Respondents, Appellees Below.

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Respondents, Building Contractors Association of Rockford, Inc. and Merle F. Drager, Individually and as Secretary of the Building Contractors Association of Rockford, Inc. respectfully pray that the petition of Suburban Tile Center, Inc. and United Construction and Trades Union, Local No. 102 for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on November 30, 1965 be denied.

OPINIONS BELOW.

The opinions below are correctly stated in the petition for Writ of Certiorari and will not be reiterated here.

JURISDICTION.

The statement of jurisdiction in the petition for Writ of Certiorari correctly sets forth the applicable statutory provision under which the petitioners seek to bring the instant case before this Honorable Court.

QUESTION PRESENTED FOR REVIEW.

The sole question presented to your Honors at this time is whether the judgment of the United States Court of Appeals for the Seventh Circuit in the instant case presents such a novel or important question of law as to justify review of that decision by this Court. The Petitioners have excessively broadened the statement of the question presented by interpolating into the record matters which were not properly before the United States District Court for the Northern District of Illinois or the United States Court of Appeals for the Seventh Circuit.

If this Court grants the petition for Writ of Certiorari the only question which it can review is whether on the basis of the factual matter before it the United States District Court was justified in dismissing the complaint of the petitioners herein for failure to state a claim upon which relief could be granted and whether the United States Court of Appeals for the Seventh Circuit was justified in affirming that decision, again based solely on the matters before that Court.

STATUTORY LAW INVOLVED.

The pertinent portions of the statutes applicable to the instant case have been correctly set forth in the petition and need not be reiterated at this point.

BASIS FOR FEDERAL JURISDICTION.

The statement of the basis on which the petitioners sought the jurisdiction of the Federal Court in this matter correctly states forth the applicable statutory provisions and is not contested by your respondents.

STATEMENT OF THE CASE.

This brief is presented by the Building Contractors Association of Rockford, Inc., a corporation and Merle F. Drager, Individually and as Secretary of the Building Contractors Association of Rockford, Inc.

The statement of the case as contained in the Petition For Writ of Certiorari is substantially correct. Suffice it to say at this time that the only matters before this Court or any other Court concerning the instant case are the pleadings which consist of nothing more than a complaint as amended and motions by the various defendants to dismiss the amended complaint. Any matter other than that contained in those pleadings is not now before this Court and should not be considered by it.

In order to put the matter in controversy more in focus for this Honorable Court we have included in our argument a brief statement of each paragraph of the complaint which applies to the respondents, Building Contractors Association of Rockford, Inc. and Merle F. Drager. Reiteration of those provisions at this point would be unnecessary duplication.

ARGUMENT IN SUPPORT OF REASONS FOR DENYING THE WRIT.

The instant case originated in the United States District Court for the Northern District of Illinois, Eastern Division. On motion of the defendant, respondents herein, the complaint of the plaintiff, petitioners herein, was dismissed by the Honorable Richard B. Austin, Trial Judge, who allowed the plaintiffs leave to amend the complaint. The respondents moved to dismiss the complaint as amended. Pursuant to those motions the trial judge dismissed the complaint for failure to state a claim upon which relief could be granted. The only matters before Judge Austin were the pleadings of the parties which consisted of the complaint as amended and motions to dismiss by the various defendants.

Thereafter the matter was appealed to the United States Court of Appeals for the Seventh Circuit which, in a decision set out in the Appendix to the Petition for Writ of Certiorari, affirmed the judgment of the District Court. The opinion affirming that decision was also based solely on the pleadings of the parties—the complaint as amended and motions by the various defendants to dismiss the amended complaint.

Thereafter the petitioners presented their Petition For Writ of Certiorari asking this Court to review the decision of the United States Court of Appeals for the Seventh Circuit.

In attempting to seek review in this Court the Petitioners must confine themselves solely to the matters which were before the trial and appeal courts. Those

matters consist once again of nothing more than the pleadings—a complaint as amended and motions by the various defendants to dismiss the amended complaint.

The principal question which the petitioners attempted to litigate was the application of the language of Section 8(e) of the National Labor Relations Act (29 U.S.C. 158(e)) to a certain construction industry subcontracting agreement entered into by several of the defendants.

Section 8(e) provides in pertinent part as follows:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract, agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work* * * *"
> (Emphasis added)

The petitioners contended in their complaint and before the United States Court of Appeals for the Seventh Circuit and once again argue in this Court that the agreement entered into between the respondents, Building Contractors Association of Rockford, Inc. and the Rockford Building and Construction Trades Council, A.F.L.-C.I.O. and to which respondent Suarez Brothers Construction Co. Inc. later became a party, exceeds the permissible

scope of the construction industry's subcontracting proviso of Section 8(e) of the National Labor Relations Act.

Recognizing once again that the only matters of this controversy before any Court are the amended complaint and the motions to dismiss, a brief summary of the complaint will put in focus for this Court the facts of the case upon which your Honors must decide whether or not to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Since Count II does not purport to apply to respondents Building Contractors Association of Rockford, Inc. and Merle F. Drager no discussion of that Count is necessary here.

Except as to a description of the plaintiffs, the first twenty (20) paragraphs of the complaint as amended are identical in Counts I and III. The first thirteen (13) paragraphs contain allegations of jurisdiction and venue, descriptions of the parties, allegations regarding trade and commerce and allegations relative to certain undertakings of Suburban Tile Center, Inc.

Paragraph 14 alleges that the defendants "and each of them entered into a combination to suppress competition among trade, craft and/or construction contractors and/or subcontractors, and/or among trade and/or craft and/or construction unions, resulting in an unreasonable restrain upon trade and in violation of Sections 1 and 2 of the Sherman Act * * *"

Paragraph 15 alleges that the defendants or two or more of them combined, conspired and confederated to maintain in existence certain agreements, understandings, conspiracies and combinations which are set out in the complaint.

Paragraph 16 deals with a purported agreement between the Rockford Trades Council and Suarez Brothers Construction Company, Inc.

Paragraph 17 alleges that on or about June 21, 1963, Suarez Brothers Construction Company, Inc. became a party to a certain restricted agreement previously existing between the Contractors Association and the Rockford Trades Council.

Paragraph 18 alleges restraint, burden and monopolization of commerce in the construction field and allied industries because of the combinations and conspiracies.

Paragraphs 19 through 21 of Count I allege that employees of Suburban Tile Center, Inc. at the construction job were union members; that plaintiff was informed by agents of the Rockford Building and Construction Trades Council, that since the employees were not members of a local union affiliated with the Rockford Trades Council, certain of them would not be allowed to work on the job; and that from time to time plaintiff was threatened with work stoppages, picketing, boycotts, and a federal suit by the Rockford Trades Council since plaintiff did not have contract with the Rockford Trades Council.

Paragraphs 22 and 23 of Count I refer to an injunction suit instituted in the Circuit Court of Winnebago County, Illinois, by the Rockford Building and Construction Trades Council, et al., against Suarez Brothers Construction Company, Inc., and the decree entered therein restraining Suarez from hiring or subletting any work to any "person, firm, corporation, or association not having a collective bargaining agreement with the Rockford Building and Construction Trades Council".

Paragraphs 24, 25 and 26 of Count I allege injury to the plaintiff, Suburban Tile Center, Inc., the public, and that Suburban Tile Center, Inc. is entitled to treble damages.

Paragraph 21 of Count III alleges that plaintiff, United Construction and Trades Union, Local No. 102, was informed by the Rockford Trades Council that certain of its members would not be permitted to render services in Rockford.

Paragraph 22 of Count III is identical with paragraph 23 of Count I.

Paragraph 23 of Count III alleges that the combinations, conspiracies, agreements and other methods to accomplish the monopolies permanently damaged plaintiff, United Construction and Trades Council, Local No. 102 and its members.

Paragraph 24 of Count III alleges that the combinations, conspiracies and confederations jeopardize the plaintiff's rights under a collective bargaining agreement with Suburban Tile Center, Inc.

Paragraphs 25 and 26 of Count III allege injury to the plaintiff and further allege that the matters as stated in the complaint had been brought to the attention of the National Labor Relations Board, which affected a settlement agreement, but which agreement in no way limited or precluded the remedies of the plaintiff in this action.

It is axiomatic that the validity of a complaint depends upon the allegations thereof containing sufficient factual matter to advise the defendants of the claim against them. And a complaint which does not allege facts sufficient to give the defendants full notice of the claim against

them or which alleges mere general conclusions does not state a claim upon which relief can be granted. *Sutton, et al.* v. *Easten Viavi Co.*, 138 F. 2d 959 (1943, C.A. 7); *Shotkin* v. *General Electric Co., et al.*, 171 F. 2d 236 (1948, C.A. 10).

It should be remembered by this Court that in order to keep this case out of the purview of Section 8(e) the petitioners must contend in essence that the agreement here in question between the Building Contractors Association of Rockford, Inc., and Rockford Building and Construction Trades Council, A.F.L.-C.I.O. and to which Suarez Brothers Construction Company, Inc. became a party prohibited the subcontracting of construction work to any subcontractor not a party to the agreement regardless of the place within Winnebago County where the construction, alteration, painting or repair of a building, structure or other work was to be performed be it at a construction site, shop and/or any parts betwixt and between (Petition For Writ Of Certiorari page 13). The petitioners also contend that the agreement in question creates a monopoly in favor of the members of the Building Contractors Association of Rockford, Inc. and the members of the Rockford Building and Construction Trades Council, A.F.L.-C.I.O. However, in support of these far reaching allegations the petitioners in their complaint fail to allege any factual matter on which this Court or any other Court might base a conclusion that the agreement in question extends beyond particular construction sites and therefor contravenes the explicit language of Section 8(e) of the National Labor Relations Act or that the agreement creates an absolute monopoly contrary to Sections 1 and 2 of the Clayton Act and con-

trary to the rule of this Court in *Allen Bradley* v. *Local Union No. 3*, 325 U.S. 797.

It should be readily apparent to this Court that any and all factual allegations in the complaint relate specifically to the particular construction site, commonly known as the Presidential Courts Project, on which petitioners were engaged in Winnebago County. Not one factual element is pleaded by the petitioners which would show that at any time has the agreement in question been extended beyond the scope allowed by the language of Section 8(e) of the National Labor Relations Act and not one factual element has been pleaded which would show that at any time has the agreement in question created or tended to create a monopoly in favor of the Building Contractors Association of Rockford, Inc. and the Rockford Building and Construction Trades Council A.F.L.-C.I.O.

Your respondents submit that these matters were before the United States Court of Appeals for the Seventh Circuit and were considered by that Court when it rendered its decision to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

Simply stated the decision of the United States Court of Appeals for the Seventh Circuit holds nothing more than that on the record before it there is no basis to conclude that the agreement in question exceeded the permissible scope of the language in Section 8(e) of the National Labor Relations Act and that on the basis of the record before it there is a clear indication that the agreement in question did not tend to create a monopoly in favor of the Building Contractors Association of Rockford, Inc. and Rockford Building and Construction Trades Council, A.F.L.-C.I.O.

The Court first considered the allegations in the pleading and concluded that they were confined to a complaint about the effect of the agreement solely on the work of the petitioners at the Presidential Courts Project. The Court then cited a number of recent cases in which contracts similar to the one here in question have been upheld. *Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co. et al.)* (1965), 151 NLRB No. 83; 58 LRRM 1490; *Orange Belt District Council of Painters No. 48* v. *NLRB,* D.C. Cir., 1964, 328 F. 2d 534, 537; *Building and Construction Trades Council of San Bernadino and Riverside County* v. *NLRB,* D.C. Cir., 1964, 328 F. 2d 540; *Essex County and Vicinity District Council of Carpenters, etc.* v. *NLRB,* 3 Cir., 1964, 332 F. 2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383* v. *NLRB,* 9 Cir., 1963, 323 F. 2d 422, 425.

Even though not necessary for its decision the Court noted that in the *Los Angeles Building Construction Trades Council* case the NLRB approved an agreement similar to the one here in question even though it was not specifically limited to a particular construction site.

The petitioners place a substantial amount of reliance on the case of *Allen Bradley* v. *Local Union No. 3,* 225 U.S. 797, in contending that the agreement in question constituted a monopoly in favor of the Building Contractors Association of Rockford, Inc. and the Rockford Building and Construction Trades Council, A.F.L.-C.I.O. However, the United States Court of Appeals for the Seventh Circuit recognized from the pleadings that the agreements all provided that any contractor or subcontractor may enter into a similar agreement. The Court then, and your respondents contend, rightly so, held that

this precluded the establishment of an effective monopoly. In the *Allen Bradley* case a complete monopoly was achieved which the Court recognized is not the case here.

This then negates the petitioners' misplaced reliance on that case as authority for its conclusion that the agreement here in question tends to create a monopoly.

In short your respondents contend that as before the United States District Court for the Northern District of Illinois, Eastern Division and before the United States Court of Appeals for the Seventh Circuit no other "facts" are before this Court than those contained in the pleadings of this case. Since the only factual allegations contained in those pleadings relate specifically to the Presidential Court Project construction site, the arguments of the petitioners as to the "extra territorial" effect of the agreement in question are immaterial and irrelevant at this time. Therefore, considering only the pleadings in this case, the question of the application of the construction industry subcontracting proviso of Section 8(e) of the National Labor Relations Act to the agreement here in question is not a question of such substantial importance that it requires consideration by this Honorable Court. Furthermore, again considering only the pleadings of this case, it is evident that the agreement here in question, by permitting any contractor or subcontractor to become a party thereto, negates any possibility of a monopoly and therefore clearly presents no serious question for the determination of this Court.

CONCLUSION.

Your respondents respectively suggest that the decision of the United States Court of Appeals for the Seventh Circuit very simply disposed of the questions presented by this case feeling that no major undecided point of law was involved. The decision of that Court should be allowed to stand unreviewed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1169

UBURBAN TILE CENTER, INC., A CORPORATION, AND UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners,

vs.

OCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO, ROCKFORD, ILLINOIS, WINNEBAGO COUNTY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS—ROCKFORD BUILDING AND CONSTRUCTION TRADES COUNCIL, CLARENCE DRUGER, GEORGE IBEN, EARL HIRTH, and MARBLE TILE AND TERRAZZO WORKERS, LOCAL NO. 31 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 54

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This brief in opposition is submitted on behalf of Rockford Building and Construction Trades Council, AFL-CIO ("Building Trades Council"); Clarence Druger, individually and as President of the Building Trades Council; George Iben, individually and as Vice-President of the Building Trades Council; Earl Hirth, individually and as

Recording Secretary of the Building Trades Council; and Marble, Tile and Terrazzo Workers, Local No. 31. The United Brotherhood of Carpenters and Joiners of America, Local No. 792, Building Contractors Association of Rockford, Inc., and Suarez Brothers Construction Co., Inc. ("Suarez") were also defendants below and are represented by other counsel.

QUESTION FOR REVIEW.

Does the judicial enforcement of an agreement entered into pursuant to the Construction Industry Proviso of Section 8(e) of the National Labor Relations Act, as amended [29 U. S. C. § 151, et seq.], constitute an unlawful restraint of trade or commerce?[1]

STATEMENT OF THE CASE.

Petitioners are a tile company and a labor organization. Their amended complaint was dismissed by the United States District Court for the Northern District of Illinois and the dismissal was upheld by the Court of Appeals for the Seventh Circuit. The complaint, as amended, alleges,

---

1. Section 8(e) of the Labor-Management Relations Act, 1947, as amended (29 U. S. C. 158(e)), in pertinent part, provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an

in substance, that a general contractor (Suarez) and a group of affiliated local unions (Building Trades Council) agreed that only subcontractors having collective bargaining agreements with local unions affiliated with the Building Trades Council would be engaged to perform work at a project which came to be called the Presidential Courts Apartment. Suarez contracted for the installation of tile with Suburban Tile Center, Inc. ("Suburban"), a contractor which did not have a collective bargaining agreement with the appropriate craft union affiliated with the Building Trades Council. In an effort to enforce its agreement with Suarez, the Building Trades Council sought (App., p. 40) and obtained (App., p. 59) an injunction enjoining Suarez from continued violation of the agreement. Suarez directed Suburban to stop installing tile at the project in question the day following the issuance of the court order (App., p. 39). Petitioners then brought this action for injunctive relief and to recover damages for injury arising out of the foregoing circumstances, alleging a violation of the anti-trust laws and a violation of Section 303 of the National Labor Relations Act, as amended, [29 U. S. C. § 187].

---

employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . .

ARGUMENT.

Petitioners have asserted three reasons why this Court should review the decision of the Court of Appeals for the Seventh Circuit. None of the reasons given warrants the issuance of the writ sought. We submit, in opposition to their contentions, that:

The decision below has no importance beyond the confines of the case, and was based on now well-settled concepts;

The decision is not inconsistent with the holding of any other Court of Appeals; and

The decision is in accord with this Court's holding in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L., et al.*, v. *N. L. R. B.*, 357 U. S. 93 (1958).

The complaint, as amended, alleged that plaintiffs were injured by reason of the judicial enforcement of a lawful agreement lawfully obtained. Congress, in enacting Section 8(e) of the National Labor Relations Act, as amended [29 U. S. C. § 158(e)], recognized that the peculiarities of the construction industry justify an exception to the basic rule forbidding an employer from agreeing with a labor union not to do business with another person. The exception, commonly called the "Construction Industry Proviso", permits a restrictive agreement with respect to certain work performed at construction sites. The Building Trades Council entered into such an agreement with Suarez which pertained to a particular construction project described as "the site of construction of Apartment Building project, west of Machesny Airport, Rockford, Illinois" (App., p. 54) and later entered into a second agreement of similar

import which was extended to apply to all Suarez construction projects within the jurisdiction of the parties (App., p. 56).

Having successfully negotiated an agreement which could have no effect other than to enhance the employment opportunities of members of its affiliated local unions (as opposed to the employment of members of other unions), the complaint alleged that the Building Trades Council, after first demanding compliance by letter (App., p. 48), instituted proceedings in the Circuit Court of Winnebago County to prohibit Suarez from violating that agreement (App., p. 40).

The well-settled concepts upon which the decision below was based are:

> The legality of the agreement.
> The legality of the manner in which it was obtained.
> The legality of the manner in which it was enforced.

The Construction Industry Proviso is a complete answer to the legality of the agreement. The origin of Petitioner's misconception concerning the effect of Section 8(e) [29 U. S. C. 158(e)] may be found in Paragraph 19 of the Second Cause of Action of their Complaint (App., pp. 29-30) where they purported to set forth Section 8(e) in its entirety, but failed to include that part of the Statute which is fatal to their claim of a violation and which renders lawful the very activity of which they complain.

The Court of Appeals correctly dealt with the second element, concerning the manner in which the agreement was obtained, by succinctly stating, "economic action to secure such agreements has been allowed (citing cases)". [354 F. 2d 1, 3]. Even Petitioners do not contend that concerted economic activity may not be utilized to obtain the kind of agreement involved in this case. The means used to obtain the agreement is clearly not in issue.

The answer to the third element, relative to enforcement of the agreement, also disposes of Petitioners' contention that the Court of Appeals decision is contrary to this Court's holding in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L., et al.*, v. *N. L. R. B.*, 357 U. S. 93 (1958), known as the *Sand Door* case. To the extent here relevant, *Sand Door* simply stands for the proposition that an otherwise lawful agreement cannot be enforced by means prohibited by Section 8(b)(4)(A) of the National Labor Relations Act, as amended [29 U. S. C. § 158(b)(4)(A)]; it does not prohibit judicial enforcement. This Court said, at page 108:

> It does not necessarily follow from the fact that unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some totally different context not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract cannot be enforced by the means specifically prohibited by § 8(b)(4)(A).

The judicial enforcement of an 8(e) contract clause is not prohibited by *Sand Door* and was specifically contemplated by Congress. Senator Goldwater, in explaining the 1959 amendments to the Labor-Management Relations Act, said:

> Thus, although employees and unions who are under this [8(e)] exemption may lawfully enter into such agreements, and *may resort to the courts for their enforcement under applicable principles of contract law,* no coercion or restraint—economic or otherwise—may be used by any party . . . (to prevent a breach). 105 Daily Cong. Rec. A8524 (September 14, 1959, remarks of Senator Goldwater); 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1858. (Emphasis added.)

The remarks of Senator Kennedy confirm this interpretation:

> It . . . [Section 8(e)] . . . is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. 105 Daily Cong. Rec. 16415 (September 3, 1959, remarks of Senator Kennedy); 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1433.

The contention that the decision below is in conflict with *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, 342 F. 2d 18 (2d Cir., 1959), is without basis. The issue presented by the instant case involves *judicial* enforcement. *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, dealt with enforcement of a contract provision by *economic coercion* forbidden by Section 8(b)(4)(A) [29 U. S. C. 158(b)(4)(A)]. Furthermore, the contract provision in *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, attempted to circumvent the "on site" requirement by defining deliveries to the site as coming within that definition. No such factor exists in this case. The agreements here were limited to the airport site, in the first instance, and construction projects, in the second. There is no issue of off site work as Petitioners belatedly suggest. To the contrary, the only dispute involved installation of tile at the apartment project and not the manufacture nor delivery of the tile in question.

CONCLUSION.

We submit that the decision below does not involve a question of federal law which has not been settled by this Court, but to the contrary, that the Court of Appeals determined a rather simple question of well-settled law which is of little significance beyond the case itself. We further submit that the decision below is consistent with the holdings of other Courts of Appeals, including the decision in *N. L. R. B.* v. *International Brotherhood of Teamsters, et al.*, 342 F. 2d 18 (2d Cir., 1956). Moreover, the decision of the Court of Appeals for the Seventh Circuit, to the extent applicable, is entirely in accord with this Court's decision in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. L. et al.* v. *N. L. R. B.*, 357 U. S. 93 (1958).

In view of the foregoing, we respectfully urge that the Petition praying the issuance of a Writ of Certiorari be denied.

Respectfully submitted,

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No. 1169

In the

Supreme Court of the United States

OCTOBER TERM, 1965

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL #102,

Petitioners-Appellants Below,

vs.

ROCKFORD BUILDING and CONSTRUCTION TRADES COUNCIL, AFL-CIO., Rockford, Illinois, Winnebago County, etal.,

Respondents-Appellees Below.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY TO BRIEFS OF RESPONDENTS

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY TO BRIEFS OF RESPONDENTS

Your Honors are herein confronted with the most significant contractual contribution that the organized magnates, business as well as labor, of the construction industry have yet devised to reshape the market places in our free economy to their liking.

While they inwardly palpitate with excitement, recognizing the ramifications ensuing from a refusal by this Court to grant the pending petition, with calculated solemnity the Respondents misrepresent the vast purview of

the instant cause, and would have this Court believe that only an isolated contract between a construction union and an employer, pertaining to on-site construction work is at bar.

The group boycott conspiracy alleged in the Petitioner's Complaint as amended, resulting from the contract between the Respondent Trades Council and the Respondent Building Contractors Association of Rockford, Inc., (multi-employers), (JA68-69), speaks of the *entire political subdivision of Winnebago County, Illinois;* only one consequence of the overall monoply occurred at the Presidential Courts Project. However, it was the weight and pressure from the all-encompassing monopolistic pact between the conspirators, (P. B., 8, 9), that flattened Suburban Tile and continues in force the group boycott that binds the multi-employers *from contracting with* any and all other contractors who do not have union-shop agreements with the local member unions of the Respondent Trades Council, within the area of Winnebago County, Illinois, as an entirety.

This Court has steadfastly held that group boycotts violate the Sherman Act. *Los Angeles Meat and Provision Drivers* v. *U. S.*, 371 U.S. 94, 83 S. Ct. 162, 9 L. Ed. 2d 150, (1962); *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 241, (1959); *Northern Pac. R. Co.* v. *U. S.,* 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545, (1958); *Columbia River Co.* v. *Hinton,* 315 U. S. 143, 62 S. Ct. 520, 86 L. Ed. 750, (1942); *Allen Bradley Co.* v. *International Brotherhood of Electrical Works,* 325 U. S. 797, 89 L. Ed. 1939, 65 S. Ct. 1533; *United States* v. *Employing Plasterers Asso.,* 347 U. S. 186, 98 L. Ed. 618, 74 S. Ct. 452; *United Mine Workers* v. *Pennington, etal.,* 381 U. S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585.

In *Klor's, Inc.* v. *Broadway-Hale Stores,* 359 U. S. 207, 212, 213, this Court held that:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category . . . For as this Court said in *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 213, 'such agreement, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."
>
> "It clearly has, by its 'nature' and 'character', a monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small business men, one at a time, as it can by driving them out in large groups."

As was stated in *Walker Dist. Co.* v. *Lucky Lager Brewing Co.,* 323 F. 2d 1, 7 (1963):

> "Group boycotts are just as illegal under the Sherman Act as group price fixing. A group boycott is a per se violation of the anti-trust laws for which there can be no justification."

A union shop agreement pertaining to a single employer, relating to a particular construction site, may be perfectly legal. However, a restrictive agreement between the entire local industry, encompassing with one stroke of the pen the major business magnates and all of their employees, providing for a group boycott of "unrecognized" employers, pertaining to an entire political subdivision, Winnebago County, Illinois, surely was not legalized by Congress, in the enactment of the proviso to 29 U.S.C. § 158 (e), (P. B. 3, 4).

Further, the Petitioners' Complaint, as amended, clearly alleges that illegal economic coercion, (JA 21), was utilized to enforce the terms of a union shop contract that the Respondent Suarez Brothers entered on November 9th, 1962, and to compel the discharge of Suburban Tile from the Presidential Courts Project.

The agreed injunction order, entered by the Circuit Court of Winnebago County, Illinois, on June 28th, 1963, (JA 59), was an aftermath of the illegal hostilities at the Presidential Courts Project and became the best artifice through which the conspirators could endeavor to put into being, at that particular battlefield, the illegal group boycott, which the Respondent Suarez Brothers had joined a week before, on June 21st, 1963, (JA 68-69). Most assuredly the "Sand Door" case, *United Brotherhood of Carpenters, et al.* v. *National Labor Relations Board,* 357 U.S. 93 (1958), was overruled in the action at bar.

If a semblance of our competitive economy is to exist within the construction industry, it will be necessary for this Court to assume jurisdiction over this action and determine whether Congress intended to sanction and remove from the embrace of the anti-trust laws, a conspiratorial group boycott, admittedly intended to eliminate and prevent so-called "substandard" employers from undercutting member contractors, within an area as vast as the entire political subdivision of Winnebago County, Illinois, by the enactment of the "Construction Site Proviso", of 29 U. S. C., Section 158 (e), (P. B. 3, 4).

Respectfully submitted,

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No. 1169.

In the

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OCTOBER TERM, 1965

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Petitioners-Appellants Below,

vs.

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Respondents-Appellees Below.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your Petitioners, Suburban Tile Center, Inc., and United Construction And Trades Union, Local #102, respectfully pray that this Honorable Supreme Court grant a rehearing of its Order entered in this cause on May 31st, 1966, denying their Petition for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The instant basis relied upon in urging Your Honors to grant rehearing is that your Petitioners had available other substantial grounds not previously presented in their Petition for the issuance of the Writ of Certiorari.

In a determination of first impression, the Circuit Court of Appeals for the Seventh Circuit, reported at 354 F2d 1, (1965), held that a Winnebago County, Illinois, area-wide group boycott conspiracy, effected in combination between the major employers, engaged therein in the construction industry and allied fields, and the Rockford Area Trades Council, AFL-CIO, was legalized by the enactment of the "Construction Site Proviso", Title 29 U.S.C.A., Section 158(e), (Pet. for Writ of Cert., 3, 4).

The Court of Appeals, at 354 F2d 1, 2, 3, found that the group boycott pact between the "Defendant Building Contracting Association of Rockford, Inc., which represents a majority of contractors and sub-contractors engaged in the construction industry and various allied industries in Winnebago County, Illinois, (multi-employers) . . . with the Defendant Rockford Building and Construction Trades Council of Winnebago County, (which consists of representatives of about twenty local unions) . . . [imposed against] anyone who does not have a collective bargaining agreement with the Trades Council or the local craft union, (affiliated with the Trades Council), which commonly has jurisdiction over the class of work involved", to have been approved by Congress "for the construction industry", and hence immunized from the purview of the Anti-Trust laws. [insert added]

Heretofore your Petitioners contended that the combine's restrictive pact, constituted an unreasonable restraint upon trade, within the scope of the anti-trust laws, and further, that Congress never intended the "Construc-

tion Site Proviso" to be the source of justification for a group boycott that assumed far-reaching economic magnitude, resulting in a major encroachment upon our free enterprise system.

Most assuredly, the decision of the Circuit Court of Appeals, and its interpretation of the "Construction Site Proviso", would as readily legalize a group boycott between the national counter-parts of the multi-employers and the Rockford Trade Council, embracing and securing for themselves the markets for the construction industry and allied fields, from Maine to California. The ramifications ensuing from the Court of Appeals' decision, will even render unnecessary the recently sought legislation, permitting picketing of a secondary employer at the primary employer's construction site, inasmuch as an injunction will issue against any of the multi-employers who contract in violation of the terms of the group boycott pact.

By reason of the decision of the Court of Appeals, the group boycott conspiracy existing in Winnebago County, Illinois, has been found to be sanctioned by the "Construction Site Proviso". If, in fact, Congress, through the media of the "Construction Site Proviso", intended to legalize the likes of the combine in Winnebago County, Illinois, *then it has arbitrarily brought into being a monstrous deprivation of personal and property rights, guaranteed by the Fifth Amendment of our Constitution.*

Your Petitioners, solely by reason of independent union affiliation, are denied the right to contract and work, through the legalization of the conspirators' group boycott agreement, within the territory of Winnebago County, Illinois. Congress cannot, consistent with the due process clause, legalize the inherently illegal conspiracy that takes

away a man's right to contract and render services and labor within Winnebago County, Illinois, any more than it could legalize the outright stealing by one group of an individual's property.

Certainly, the specific intent of Congress in enacting the "Construction Site Proviso" may be judicially explored by viewing it alongside of contemporary legislation. Under Title 42 U.S.C.A., Section 1981, entitled "Equal Rights Under The Law", Congress provided that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts. . ."

The first impression decision of the Court of Appeals', interpreting the "Construction Site Proviso", cannot possibly be reconciled with civil rights legislation spelling out the constitutional message of due-process in our day.

In light of Congress' granting employees protection in the selection of their union representation, can the "Construction Site Proviso" be construed so as to harmonize a man's being precluded from contracting, rendering services, and/or working in a political sub-division of a State by reason of his, or his employees' union affiliation, while Congress jealously protects an employee from being so barred, under color of local law, by reason of his race or color?

Under the Fifth Amendment to the Constitution of the United States, no person shall be ". . . deprived of life, liberty, or property without due process of law; . . ." It is beyond question that the right and liberty of every person to engage in a lawful occupation, trade, or calling, is within the framework of this constitutional protection.

Perhaps at a particular construction site, certain affiliated union members need not be required to work along-

side of men belonging to independent unions or with non-union personnel, and accordingly, the "Construction Site Proviso" may be constitutionally justified on this limited basis. However, no organized group of employees, in combination with their employers, in a major industry, may be constitutionally permitted by Congress to tie down a territory as vast as Winnebago County, Illinois, and make their respective competitors' right to contract, work, or render services therein, subject to their terms and conditions.

By guaranteeing employees' freedom to elect their union membership, (Title 29 U.S.C., Section 157), (Pet. for Writ of Cert., 4), and making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of these rights", Congress intended a meaningful enactment of our fundamental concept of fairness.

If Congress legalized group boycotts for the construction industry, aside from treading upon unconstitutional grounds, it made a shamble of the guarantees of freedom it bestowed upon employees. If employees select their own independent union, pursuant with Title 29 U.S.C., Section 157, then a legalized group boycott can preclude them, as well as their employer, who has no choice in the matter at all, from working within a boycotted territory. This is exactly what the conspirators in the case at bar admittedly intend, in order that their joint control over the monopolized area could be maintained.

Senator Taft, in announcing the policy which the "Construction Site Proviso" stemmed, stated at 93 Congressional Record, 4918:

> ". . . Under the Norris-LaGuardia Act, it became impossible to stop a secondary boycott . . . no matter

> how unlawful it may have been at common law. All this provision of the Bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee . . . never succeeded in having anyone tell us the difference between kinds of secondary boycotts. So we have broadened the provisions dealing with secondary boycotts to make them an unfair labor practice."

Congress, in passing Title 29 U.S.C., Section 158(e) of the Labor Management Reporting and Disclosing Act, evidently discovered a good limited secondary boycott. However, when what Congress intended to be legal secondary boycott at a particular construction site, is judicially construed to include a group boycott conspiracy, barring all competing, nonrecognized employers and unaffiliated employees from an area as vast as Winnebago County, Illinois, a fundamental encroachment upon individual rights of liberty and property, protected by the due-process clause, has come into being.

As was stated in *Loewe* v. *Lawler,* 208 U.S. 274, 293-294, (1907):

> "The [Sherman Anti-Trust] Act prohibits any combination whatsoever to secure action which essentially obstructs the free flow of commerce between the states or restricts, in that regard, the liberty of a trader to engage in his business. The facts showed a combination that falls within the class of restraints of trade aimed at compelling third parties and strangers, involuntarily, not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt that (quoting from Chief Justice Earle on Trade Unions), 'at common law, every person has individually and the public has

collectively, the right to require that the course of trade should be kept free from unreasonable obstructions.'"

By legally depriving your Petitioners of their right to contract and render services and labor within Winnebago County, Illinois, Congress has arbitrarily taken from them a right of liberty, as well as a right of property, protected by constitutional guarantees.

Clearly, the Fifth Amendment came into being to protect the rights of individuals from arbitrary legislative abuse, such as exists in the case at bar. The very ability of your Petitioners herein to work and survive has been challenged by reason of the power Congress bestowed upon certain organized groups, who can now demand their consideration for allowing one to contract or work within their legally protected territory.

If the interpretation of the Circuit Court of Appeals is correct, which is strenuously denied by your Petitioners, then the "Construction Site Proviso" was intended to arbitrarily grant certain, otherwise illegal combinations in our free society, the control over the very right of nonmembers, to work and market their products, within all areas where group boycott conspiracies prevail. Such an unfettered denial of fundamental individual liberties and property rights, cannot be sanctioned by Congress, consistent with constitutionally vested guarantees.

At the very least, Your Honors should and must grant rehearing herein for the purpose of considering the important issues, of first impression, resolved by the decision of the Circuit Court of Appeals for the Seventh Circuit, that are of vital daily economic consequence upon the functioning of our free enterprise system.

CONCLUSION.

For the reasons set forth above, and heretofore presented in the Petition for a Writ of Certiorari, and on brief filed in reply to briefs of Respondents, it is respectfully urged that rehearing be granted herein and that upon such rehearing, a Writ of Certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

Earl G. Schneider, a member of the Bar of this Honorable Court hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay, and is restricted to substantial grounds available to Petitioner and not previously presented.

EARL G. SCHNEIDER